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Carl Zeiss Stiftung v. V.E.B. Carl Zeiss Jena, D.C. Cir. 1967, 40 F.R.D. 318, 328 (cited in Petition at p. 14)

Greene v. McElroy, 1959, 360 U.S. 1377, 1391 (cited in Petition at p. 18)

Mink v. Environmental Protection Agency, D.C. Cir. 1971, 40 USLW 2233 (cited in Petition at p. 14)

Moore-McCormack Lines, Inc. v. United States, U. S. Court of Claims 1969, 413 F. 2d 568, 585 (cited in Petition at p. 18)

IN THE

SUPREME COURT OF THE UNITED STATES

October TERM, 1972

NO._____

K. C. WU, PETITIONER

v.

NATIONAL ENDOWMENT
FOR THE HUMANITIES
and WALLACE B. EDGERTON, as Acting
Chairman for THE NATIONAL ENDOWMENT
FOR THE HUMANITIES, Respondents

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on May 2, 1972.

CITATION TO OPINIONS BELOW

The opinion of the Southern District of Georgia denying petitioner's motion for summary judgment and granting respondent's motion for summary judgment is printed in Appendix B hereto and has not been reported in the official reports. The opinion of the Court of Appeals for the Fifth Circuit, which affirmed the judgment of the District Court for the Southern District of Georgia, is printed in Appendix A hereto and is not yet reported in the official reports but has been reported Slip Op. No. 71-2852.

JURISDICTION

The judgment of the Court of Appeals, printed in Appendix A hereto, was entered on May 2, 1972. The Court of Appeals stayed its mandate for 30 days on May 30, 1972.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

THE QUESTIONS PRESENTED

1. Has the National Endowment for the Humanities, or any Federal Agency, the privilege or the authority to withhold from the public what is pure and factual academic information or knowledge?

2. Has the Endowment, or any Federal Agency, the privilege or the authority to make an injurious allegation against an individual and then deny that individual an opportunity to defend himself?

3. Has the Endowment, or any Federal Agency, the privilege or the authority to pursue a determined and continuous course of action, or to adopt and practice an open and declared policy, that clearly conflicts with and actually defeats the very purpose that has been explicitly defined and stated in a statute, and for which Congress has established the agency?

STATUTES INVOLVED

The Statute giving the District Court jurisdiction is 5 U.S.C. 552 (a) (3). The issue involved is whether the information sought is exempt from disclosure by 5 U.S.C. 552 (b) (5).

The "Congressional declaration of purpose" for the creation of the National Endowment for the Humanities is stated in 20 U.S.C. 951 (1) and (5). The question at issue is whether the policy and practice adopted by the Endowment is in conflict with this statute-defined purpose.

All these provisions are printed in Appendix E hereto.

STATEMENT

In stating the facts of the case in its Opinion, the Circuit Court of Appeals has omitted the crucial facts that form the very basis of petitioner's complaint. For clarity's sake, we think it necessary to quote the Court's statement here in full and then point out what crucial facts have been omitted:

"Appellant was born in 1903 in China, where he received a 'classical' Chinese education. He has lived in the United States for a number of years and is presently a college professor in Georgia. About 1966 appellant became convinced that most Chinese histories available in the United States were replete with factual errors. He attributes this deficiency to the inadequate training of Western sinologues, few, if any, of whom have had the benefit of a 'classical' education.

"In hope of correcting the errors he perceived, appellant wrote an article, 'Local Government in Imperial China,' which he submitted to the Journal of Asian Studies, the official publication of the Association for Asian Studies. The article was not accepted for publication. Appellant reacted by writing numerous letters over a period of a year and a half to the editors of the Journal, challenging their rejection and asking for detailed reasons for their decision. Dissatisfied with their response, appellant compiled a booklet that consisted of a brief introduction and conclusion and the forty-two letters comprising his correspondence with the Journal. He sent the booklet to 'nearly every known China specialist in this country inviting them to refute [his]

criticisms.'[1] In addition, he wrote to the presidents of Harvard, Yale, Cornell, Michigan, California, and other colleges and universities, requesting them to urge their China scholars to refute his allegations of error. None of the China scholars replied.

"Having failed to generate debate or even discernible interest in his theories, appellant concluded he should write a comprehensive history of China in which he would correct the errors he was concerned about. To assist him in this project, he applied to the National Endowment for the Humanities, a federal agency, for a $70,000 grant. Under Endowment procedures, this application was referred initially to five experts on Chinese history, each of whom is a professor of history at an American university. Four of these professors submitted written reviews and the fifth provided an oral review and requested that his comments be kept confidential. Each of the reviewers recommended rejection of the application. Secondly, the application, along with others, was referred to a panel of outside experts who consult the Endowment on the humanities generally but not necessarily on Chinese history in particular. This panel recommended rejection of the application. Next it was referred to a committee of fulltime staff members of the Endowment, who reviewed it along with all other applications in the research program. This committee also recom-

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[1]Appellant's brief provides us with a summary of two of his criticisms of Western Chinese scholarship:

> (2) The Chinese never called their country "Flower Kingdom." The mistake was first made by Father Matthew Ricci around 1600 A.D.; but over these centuries not a single sinologue has realized that it was a mistake and sought to correct it. And (3) even in the matter of Confucianism, the one most important aspect of the Chinese culture, no Western scholar seems to have shown complete understanding. This is evidenced by the fact that though the translations of the Confucian classics were done by James Legge a century ago and are full of mistakes and obscurities, these are still being cited as standard works and used as a basis for the study of Confucianism.

mended rejection. Through this third level of consideration, each reviewer who assigned a numerical rating to the application assigned it a rating of "two." This rating signifies that the application is of poor quality and should not be funded even if enough money is available to support every application to the Endowment. Finally, the application was referred to the National Council on the Humanities which rejected it. The Chairman of the Endowment formally advised plaintiff of the rejection.

"Appellant brought this action under the Freedom of Information Act, 5 U.S.C.A. § 552(a) (3) which provides in part:

> (a) Each agency shall make available to the public information as follows:
> (3) [E]ach agency, on request for identifiable records . . . shall make the records promptly available to any person. On complaint, the district court of the United States . . . has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly held from the complainant.

"Appellant sought the following information:

> Records, or portions of records, which contain the refutations of each and all of the Defendants' five China specialists and which have been made by said specialists against complainant's criticisms of Western scholarship in the field of Chinese studies which were included in and were a part of Complainant's application to the Endowment and which application was known under Reference No. Application H-4344 and was dated January 22, 1970.
>
> Records or portions of records, which contain all of the facts or evidence which each and all of the Defendants' five China specialists gave to the said Defendant, National Endowment for the Humanities, in support of their statement that Complainant's training is not equal to the task which he has set himself to, that is, to write a

> new comprehensive "History of China," which would correct many mistakes heretofore made by Western scholars.

"The Endowment resisted vigorously, fearing that if its outside consultants were subjected to one of appellant's massive letter-writing campaigns the Endowment would lose their services. Mr. Emerson, an Endowment official, said in his affidavit:

> These outside reviewers are not paid but furnish evaluation as a public service for the good of the humanities. Sometimes, they specifically ask that their recommendations be kept confidential. Even when such a specific request is not made, however, it is vital for the Endowment that their recommendations not be available to applicants; only then can reviewers be free to state their true opinion of an application without regard to the feelings of the applicant.

"The Endowment based its defense on exemption (5) of the Freedom of Information Act:

> § 552
> (b) This section does not apply to matters that are —
> (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.

"The district court granted summary judgment for the Endowment, concluding that the records sought came within the purview of exemption (5)."

The above is the Court of Appeals' statement of the case in full.

Speaking objectively, to be fair to petitioner, the Court of Appeals should have at least included a few words about petitioner's Western-training background and about the actions of the Jour-

nal of Asian Studies that had prompted petitioner to publish his booklet. But these are small matters. The crucial omission is the following:

In rejecting petitioner's application, the then Chairman of the Endowment did not think it necessary at all to go into the various levels of evaluation as detailed in the Court's statement; but only made these statements in writing to petitioner:

> "Your application was reviewed by five historians of China, all of them outstanding specialists in this field."
>
> "Speaking generally, I can say that they felt that your training was not equal to the task which you have set yourself . . ."
>
> "The reviewers were not impressed by your criticisms of the scholarship of Western sinologues and they did refute them."

These statements above are sine qua non in this instant case. Had the Endowment not made them, petitioner would not have brought forth this litigation requesting the disclosure of information pertaining thereto. Since it did make them, they form the very core of the basis of his complaint. All this can be readily seen from petitioner's affidavit, from his brief, and from his reply brief. Yet the Court throughout its opinion, from the beginning to the end, makes no direct reference whatever to these statements, nor to the one essential fact that the Endowment had made them.

A. ON THE QUESTION OF THE REVIEWERS' REFUTATIONS OF PETITIONER'S CRITICISMS

The information sought by petitioner is clearly given in his Complaint, which in turn is quoted verbatim by the Court in its statement of the case above. In order to clarify the issues by summing up the reasons for his request, petitioner has stated in his brief (p. 24) and repeated in his reply brief (pp. 8 & 14) that the information he seeks consists of the following two categories:

(a) The five reviewers' refutations of plaintiff's criticisms of Western scholarship in the field of Chinese studies, because the information is academic knowledge pure and simple that can in no way be characterized as "intra-agency opinions, non-factual in nature," and therefore, no government agency may claim the privilege of withholding it from either plaintiff or the general public; and

(b) the five reviewers' reports alleging that plaintiff's training is not equal to the task which he has set himself, because the agency had formally recited these reports as the basis for its rejection of the application, and because to withhold the information is to deny plaintiff "an opportunity to show that it is untrue."

In view of the above, it is difficult to think how the issues could have been misconstrued. But the Court's opinion has so baffled petitioner's understanding that in order not to distort its meaning he feels compelled to quote it at length as follows:

> . . . Appellant argues that these cases support his position, since all he seeks is academic knowledge that is in the truest sense "purely factual." We disagree. The records he wants on the inadequacy of his academic background are opinions, not facts, and are thus protected by exemption (5). The agency's consultants simply concluded from the facts appellant submitted that in their opinion his training was inadequate. The agency is withholding only the opinions of its experts, not any facts. (Appendix A (opinion) P.P. 28)

To this above passage petitioner will return later. For the present discussion it is best to continue with what immediately ensues in the Court's opinion:

> We turn now to the second category of information sought by appellant, the consultants' memoranda on the merits of his proposed project. Again we apply the

"purely factual" test to determine if these memoranda are exempt from disclosure. The test is, of course, not an ironclad one, since virtually any memorandum prepared for an agency will contain some factual material along with the opinions and recommendations. A careful case-by-case analysis of the material sought is thus necessary. We believe, however, the "purely factual" rule can be better understood when viewed in the context of the cases in which it has been employed. The material at issue in these cases has always been predominantly, if not purely, factual information that is not generally available to the public. (Here the Court cites some cases, most of which appellant has also cited in his briefs)

In contrast, in the instant case the memoranda sought are not factual or scientific reports but recommendations containing the opinions of five China specialists on the merits of appellant's application for a federal grant. Such recommendations will usually contain some factual material but it is only incidental to their primary purpose, which is the expression of an opinion to assist the agency in reaching a decision on the grant. There was no requirement here for the consultants to "refute" appellant's theories. We do not think the fact that one or more of the five either included some factual material in his memorandum or stated to the Endowment that he was able to refute appellant's arguments transforms these opinions into factual matter within the meaning of the "purely factual" rule.

A quick look at the petitioner's request and the Court's opinion side by side will instantly reveal the incongruities.

The information sought by petitioner is not "the consultants' memoranda on the merits of his proposed project." Nor is it "recommendations containing the opinions of five China specialists on the merits of petitioner's application for a federal grant." These are far larger in scope than the simple and restricted information sought by petitioner, which is only "Records, or

portions of records, which contain the refutations of each and all of the Defendants' five China specialists and which have been made by said specialists against complainant's criticisms of Western scholarship in the field of Chinese studies." (Emphasis added)

How did petitioner learn that his criticisms had been refuted? It is because the Endowment had formally and explicitly told him so: "The reviewers were not impressed by your criticisms of Western scholarship and they did refute them."

The reviewers were not just "not impressed by" the criticisms. Nor were they said simply to be in disagreement with them. But as the Endowment had put it with emphasis, "they did refute them."

True, as the Court states, "There was no requirement here for the consultants to 'refute' appellant's theories." But the fact is, according to the Endowment itself, "they did."

Nor can this dictum by the Court be held valid, to wit:

> We do not think that the fact that one or more of the five either included some factual material in his memorandum or stated to the Endowment that he was able to refute appellant's arguments transforms these opinions into factual matter within the meaning of the "purely factual" rule.

If all the five only stated to the Endowment that they were "able to refute petitioner's arguments," then the Endowment would not and could not have stated with such decisiveness, "they did refute them." If "one or more of the five . . . included some factual material" that "did refute" petitioner's criticisms, then this is precisely the information petitioner seeks — "portions of records, which contain the refutations;" and pursuant to the purely factual rule the Court should have ordered the disclosure of that "factual material" to him.

The above is all the Court has said about this category of information sought by petitioner. As demonstrated, it is not only contrary to the facts of the case but also full of self-contradictions. Yet, perhaps, it might be argued on the Court's behalf that these "refutations" might not be factual studies or academic knowledge pure and simple. So let us study this matter further.

Now, according to dictionary, "refute" is "prove to be false or erroneous." Petitioner has criticized Western scholarship on the ground that all Western scholars are deficient in the understanding of Chinese classical language — the written language of China until 1920's. And he has given three examples, two of which have been mentioned by the Court in the statement of the case, and one omitted. So if the reviewers "did refute" these criticisms, they must have proved that all the three examples are false or erroneous.

Take the first one. Petitioner has stated that the Chinese never called their country "Flower Kingdom", that this error was first made by Father Ricci, and that throughout these last three and a half centuries no Western sinologue has discovered that it is a mistake. In order to refute this criticism, the reviewers need only produce proofs that at a certain time or in a certain Chinese book the Chinese did call their country "Flower Kingdom," or proofs that among the Western sinologues in these some 370 years this one or that one did discover that it was a mistake and had put it down on record.

Or take the second example. Petitioner has given a concrete instance of the erroneous translation of Confucian classics. The reviewers need only point out that that translation is correct, and the meaning of it is in accord with the teachings of Confucius.

Or take the third example which the Court did not mention. Petitioner has claimed that the system of local government in China from the 14th century down to 1911, is entirely different from what the Western scholars have described. He has given quite a few particulars on this subject in his application to the

Endowment. In order to refute that, the reviewers need only produce proofs that these particulars are in error.

As can be readily seen, the criticisms petitioner has raised are all based on facts. If these are to be refuted, they can only be refuted by factual proofs that his facts are "false or erroneous." Since the Endowment has expressly and emphatically stated to petitioner that its reviewers "did refute them," the reviewers must have given the Endowment their factual refutations that enabled it to make the statement. If these "refutations" cannot be called "factual studies" or "academic knowledge pure and simple," then what else, if anything, can be characterized as such?

Moreover, the Endowment is the sole possessor of this academic knowledge or information. As is borne out by the Court's statement of the case, to this date no China specialist has answered petitioner's criticisms, not to say "refuted them." Only the Endowment has declared in writing that its five reviewers "did refute" these criticisms. There is no alternative source available either to the general public or to petitioner to acquire this information. Hence, there is an even more compelling urgency to disclose these refutations. (See Mink v. Environmental Protection Agency, D.C. Cir. 1971, No. 71-1708, decided October 15, 1971, slip op. at p. 8, 40 USLW 2233; Carl Zeiss Stiftung v. V. E. B. Carl Zeiss Jena, D.C. Cir. 1967, 40 F.R.D. 318, 328)

Furthermore, if this instant decision is allowed to stand, the implications will be far and wide. It will enable a Federal agency to use exemption (5) to withhold whatever information it does not wish to disclose, even though it may be academic knowledge pure and simple; it will nullify all the previous rulings that factual studies and scientific reports should be excluded from the exemption by simply arguing that though they contain some factual material, they were prepared "along with the opinions and recommendations" in the same memorandums. And what factual studies and scientific reports can stand up against such an argument? Even sheer numbers can be said to convey meanings and inclinations, as most statistics do. And there does not exist a single scientific report, no matter how factual, that may not be

said to be giving preference to one view over another. This instant decision therefore runs directly counter to the decision rendered in Bristol-Myers Co. v. Federal Trade Commission (1970), 424 F. 2d 935, 939:

> The statute exempts inter-agency or intra-agency memorandums or letters which would not be available to a party other than an agency in litigation with the agency . . . . This provision encourages the free exchange of ideas among government policy makers, but *it does not authorize an agency to throw a protective blanket over all information by casting it in the form of an internal memorandum. Purely factual reports and scientific studies cannot be cloaked in secrecy* by an exemption designed to protect only "those internal working papers in which opinions are expressed or policies formulated and recommended. (Emphasis added).

B. ON THE QUESTION OF THE REVIEWERS' ALLEGATION AGAINST PETITIONER

The second category of information sought by petitioner consists of:

> (b) The five reviewers' reports alleging that plaintiff's training is not equal to the task which he has set himself, because the agency had formally recited these reports as the basis for its rejection of the application, and because to withhold the information is to deny plaintiff "an opportunity to show that it is untrue."

This was so stated by petitioner in his brief (p. 24), and repeated in his reply brief (p. 14).

The only paragraph of the Court's opinion on this matter is this:

> . . . Appellant argues that these cases support his position, since all he seeks is academic knowledge that is

> in the truest sense "purely factual." We disagree. The records he wants on the inadequacy of his academic background are opinions, not facts, and are thus protected by exemption (5). The agency's consultants simply concluded from the facts appellant submitted that in their opinion his training was inadequate. The agency is withholding only the opinions of its experts, not any facts. (Appendix A, p. 28)

As may be readily seen, petitioner never argued for the disclosure of this particular information on the ground that it is academic knowledge. That is the basis for his request to disclose the reviewers' refutations to his criticisms; and has nothing to do with this instant separate request. The Court has apparently confounded the issues. It is as a Chinese saying goes, the Court has "put Mr. Chang's hat on Mr. Li's head."

Moreover, petitioner has explicitly declared in his reply brief:

> At the very outset we wish to make our position again perfectly clear. We have never contended that the information sought in this category is not involved with "opinions and recommendations" of those reviewers. In fact, Wu would never have asked for this particular information but for two things of the Endowment's own doing: The Endowment openly stated that the reviewers consider Wu's training not equal to the task of writing a new comprehensive history of China, and also acknowledged that the reports of those reviewers constituted the sole basis for its rejection of Wu's application.

So there does not seem to exist any reason for the Court to have misunderstood the contentions of petitioner.

In fact, petitioner bases this particular request entirely on case law. In American Mail Line, Ltd. v. Gulick, (1969), 411 F. 2d 696, 703, we read:

> We do not feel that appellee should be required to "operate in a fishbowl," but by the same token we do not feel that appellants should be required to operate in a darkroom. If the Maritime Subsidy Board did not want to expose its staff's memorandum to public scrutiny it should not have stated publicly in its April 11 ruling that its action was based upon that memorandum, giving no other reasons or basis for its action. When it chose this course of action "as a matter of convenience" (Brief for Appellee at 9) the memorandum lost its intra-agency status and became a public record, one which must be disclosed to appellants.

Then a concurring opinion stated thus (ibid 705):

> . . . when an agency recites that it bases a certain decision upon a certain described memorandum, the memorandum ceases to be a protected intra-agency memorandum and must be shown to the interested public . . .

This ruling is further supported by Bristol-Myers Co. v. FTC, (1970), 424 F. 2d 935, 939:

> Furthermore, an internal memorandum may lose its protected status when it is publicly cited as the sole basis for an agency action.

But the Court says, "The agency's consultants simply concluded from the facts appellant submitted that in their opinion his training was inadequate." This is begging the question: From what facts petitioner had submitted? From the facts that he was a Phi Beta Kappa from Grinnell College, a Ph. D. from Princeton University, a winner of a New Jersey State historical essay contest and of two fellowships awarded by Princeton for outstanding scholarship? Or from the facts that he had authored many articles and two books (not counting the booklet he sent to the China specialists), all published in English? Indeed, to say under these circumstances that petitioner is inadequate in training can

be compared to saying the same about a lawyer who has passed the bar examination and practiced law for years!

Imagine such a lawyer applying for a position in a law firm, and the law firm replying in writing that after having referred his application to a group of consultants, it was rejected because they had found him inadequate in training. And when the lawyer asked for evidence in support of the allegation, the firm resisted by saying that as the relationship between themselves and the consultants is lawyer-client relationship, the information is privileged and cannot be divulged.

Of course no law firm would ever have made such a statement about the lawyer in the first place. But in this case, the plain fact is — The Endowment did make that statement about petitioner. This is the ratio decidendi of the precedents cited above, requiring disclosure of information sought. But here the Court seems to have disregarded both the fact and the precedents.

Moreover, there is another vital principle involved in this matter. The withholding of the requested information has done great injury to petitioner and also violated his individual rights. This point of law is laid down clearly in Moore-McCormack Lines, Inc. v. United States 413 F. 2d 568, 585:

> Because this right to know is so basic to fair process, the courts have often read agency regulations and procedures, and the statutes from which they derive, to include comparable safeguards insuring knowledge of the relevant contentions . . .
>
> (W)here government action seriously injures an individual, and the reasonableness of the action depends on fact finding, the evidence used to prove the government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. Greene v. McElroy, 360 U.S. at p. 496, 79 S.C. at p. 1413.

The law on this point cannot be clearer. Yet here again the Court seems to have chosen not only to ignore petitioner's argument but also not to follow the doctrine of stare decisis.

Furthermore, if this decision is allowed to stand, it will have the gravest consequences upon all American citizenry. Hereafter, any Federal agency or all Federal agencies, using this case as precedent, will be free to make any sort of allegations against any citizen concerned — allegations that will injure his reputation and cause him mental or physical suffering. And this the Federal agencies will be able to do with complete immunity, because at any time when they are asked to produce evidence in support of the allegations, they can always entrench themselves behind the unsurmountable wall of exemption (5) of the Freedom of Information Act and claim the privilege of withholding such information from the public.

C. ON THE QUESTION OF POLICY

So far, as is demonstrated above, it appears to be petitioner who has based his arguments on case law, and the Court that has not followed the doctrine of stare decisis. But the Court stated:

> Appellant bases his case more on policy than on statutes or case law. He firmly believes that the failure of the academic community to respond to his theories on China is reprehensible at best. The courts are apparently his last resort in his effort to generate debate. The Endowment responds with its own policy argument. It says requiring disclosure of these memoranda would seriously weaken its programs, which rely heavily on unpaid outside experts. Just as professors would be hesitant to render opinions on their students who apply for Government-supported scholarships if they knew their recommendations were to be made public to "any person," they would be equally hesitant to assist the Endowment on grant applications if their comments were available to the public. (Appendix A, pp. 28)

Then the Court concluded:

> . . . Moreover, we agree with the Endowment that disclosure of the records sought could severely hamper

> its work. The community of Chinese scholars and of others in specialized fields is small, and the members are the only ones qualified to evaluate each other's work. Surely they would be hesitant to be frank with the Endowment in their evaluations of a colleague's work if they knew he could readily obtain their comments from the Endowment. The Endowment's interest in retaining the services of these outside experts clearly outweighs the public's interest in whatever factual excerpts there may be in the memoranda appellant seeks. (Appendix A, pp. 28)

The above opinion is indefensible from two different points of view — and opposite ones at that.

I

From the very point of view that upholds this Endowment's policy and practice not to make evaluations of applications available to applicants:

The weakness of the Endowment's position in this instant case lies in the fact that both the Endowment and the Court blame petitioner for demanding the disclosure of the information, rather than blame the Endowment for making those statements which gave petitioner legal grounds for the request both pursuant to the Freedom of Information Act and in accord with case law, and which the Court has omitted in its statement of the case. Yet the contrary is true. For unless this primal cause of trouble is removed, difficulties will not cease to arise for the Endowment. So long as it continues making statements indicating or implying that "along with the opinions and recommendations" of its consultants there are factual studies or academic knowledge forming a part of their memoranda, the interested public will feel they have a right to be informed of them. And so long as the Endowment keeps on making allegations against applicants, the injured persons will feel compelled to ask that they be given an opportunity to defend themselves. And there is the case law and the statute in support of such demands, this instant Court decision

notwithstanding. Under these circumstances, according to the Court's and the Endowment's own argument, even though the information sought by petitioner is denied him in this case, it will not prevent the outside consultants from being "hesitant to be frank with the Endowment in their evaluations of" applications.

Now, if the Endowment is ordered to disclose the information, let us examine what results will follow. If the Endowment is still determined to pursue the policy not to make evaluations available to applicants, what it needs to do to preserve the efficacy of the policy is simple. It may just take a lesson from this instant case, and refrain hereafter from making such statements about an application as it has made to petitioner. In fact, it may even reaffirm this policy to all its outside consultants that from now on when it rejects an application it will make a bare statement about the rejection without going into any aspects of the reviewers' evaluations. Surely, in this way the consultants will be reassured of their safety in saying whatever they wish to say; and the disclosure of the information sought in this case will have no effect whatever on the present practice the Endowment wishes to continue. The Court's opinion on this matter is therefore not logically valid.

II

However, this is a point on which a serious federal issue is involved. So let us examine the matter further — this time from an entirely different point of view; in fact, from one that opposes and condemns this policy or practice of the Endowment.

The Court's opinion upholding the Endowment's practice or policy, as is shown above, is based on policy, and on policy only. But the petitioner's position, which has always been his position throughout the litigation, is based not only on policy but on an Act of Congress, the very Act which creates the National Endowment for the Humanities. Title 20 United States Code Ann. § 951 reads:

§ 951. Congressional declaration of purpose

The Congress hereby finds and declares ——

> (1) that the encouragement and support of national progress and scholarship in the humanities and the arts, while primarily a matter for private and local initiative, is also an appropriate matter of concern to the Federal Government;
>
> (5) that the practice of art and the study of the humanities requires constant dedication and devotion and that, while no government can call a great artist or scholar into existence, it is necessary and appropriate for the Federal Government to help create and sustain not only a climate encouraging freedom of thought, imagination, and inquiry but also the material conditions facilitating the release of this creative talent;

The purpose for which the Congress has established the National Endowment for the Humanities is therefore beyond any doubt and misinterpretation. It is petitioner's firm belief that the nature of the National Endowment for the Humanities as an administrative agency is quite different from that of most other administrative agencies. It is established "to help create and sustain . . . a climate encouraging freedom of thought, imagination, and inquiry" in the humanities. The withholding of such information as is sought by petitioner will produce an exactly opposite effect. In other words, it will be defeating the very purpose for which Congress has created the agency.

Now the Court says, "The Endowment responds with its own policy argument. It says requiring disclosure of these memoranda would seriously weaken its programs . . ." It again says, "Moreover, we agree with the Endowment that disclosure of the records sought could severely hamper its work." May we ask, what programs and what work? The only work, the only programs that the Endowment can have can be only for one goal — to fulfil the purpose the Congress has prescribed for it. So, based on this vital point, petitioner has raised the following points:

(a) Can "a climate encouraging freedom of thought, imagination, and inquiry" ever be created from a process wrapped up in "secrecy"? (Brief, p. 28)

(b) If this practice or policy were to continue unchecked, would not the Endowment "degenerate into an institution that fosters and nourishes only intellectual tyranny and academic nepotism"? (Reply Brief, p. 26; Brief, p. 31)

The Court says, "The Community of Chinese scholars and of others in specialized fields is small, and the members are the only ones qualified to evaluate each other's work." If this is true, it becomes all the more necessary to have their evaluations disclosed to the public. For speaking strictly from the standpoint of logic, the more limited the number of specialists is, the easier it will be for them to indulge in intellectual tyranny and academic nepotism under the cloak of secrecy.

(c) The Endowment, however, insisted that "in fulfilling its functions . . . it is vital for the Endowment that their (reviewers') recommendations not be available to applicants," as if this practice or policy is the only one practicable. In order to meet this argument, petitioner proposed an alternative (Brief, pp. 29-31): All evaluations will be made available to applicants as a matter of course. And if any evaluation is disputed by an applicant, he may submit his criticisms to the Endowment, which may pass them on either to the original reviewers for their reconsideration or rebuttal, or to another panel of reviewers for a second review. And after these new deliberations are turned in, the Endowment may then decide what to do about the application in the light of the latest evaluation. In petitioner's opinion, such a procedure will have two advantages: On the one hand, as the Endowment retains the final discretionary power of making the decisions, so its administrative efficacy will be in no way impaired. And on the other, a genuine "climate encouraging freedom of thought, imagination, and inquiry" will be created and sustained.

And petitioner continued:

> Of course, the Endowment may yet reply that many a reviewer may take exception to this procedure and may

> not be willing to express their honest opinions as before. But free, uninhibited exchange of ideas is the only way by which knowledge has been advanced in the past and can be advanced in the future. While the policy of disclosure may be hampered with the Endowment's alleged drawback, it is nothing to be compared with such greater evils as intellectual tyranny or academic nepotism that the policy of secrecy may very well breed. Besides, no true scholar when asked to review an application, should be reluctant to offer his honest opinions regardless of others' feelings. If he does show such a reluctance, then it is questionable whether the Endowment should invite him as a reviewer at all.
>
> We are not saying that the Endowment must necessarily adopt the above procedure. We are just suggesting that there are alternatives open to them other than their present policy, which will work for them equally well, if not better. But what we do wish to point out firmly is this: There can be only one thing vital for the Endowment. It is to fulfill the purpose for which it is established — "to create and sustain . . . a climate encouraging freedom of thought, imagination, and inquiry" in the humanities. It is not vital for the Endowment to create and sustain that climate for only a limited number of reviewers. It is vital for it to create and sustain that climate for all.

(d) And lastly there is the question of what will result from the withholding of the information sought in this case. This has been discussed by petitioner in his brief (pp. 28-9):

> If the Endowment were allowed to withhold the information, the only ones who were given a chance to exchange ideas on the subject freely were the five reviewers; and all other scholars in this field, as well as the general public, would be denied a chance to express theirs. Moreover, a possible opportunity of improving the understanding of China by the American people might

be lost indefinitely. At any rate, a free discussion on the subject would be halted for good.

This is certainly not the way "to create and sustain . . . a climate encouraging freedom of thought, imagination, and inquiry," but directly contrary to the purpose expressly defined by that Act of Congress.

Yet throughout the Court's opinion, none of the above arguments were ever mentioned. And what is more, not a word was even said about the Act of Congress, Title 20 United States Code Ann. § 951, (5).

When Congress enacts a statute which carries provisions contrary to the Constitution, the Courts have the authority to decide on its constitutionality and declare it null and void. Now, when a Federal agency carries out a course of action or adopts a policy, which is directly contrary to the Statute by which it is established, should not the Court rule on its legality and declare it null and void too?

To have a Federal agency unwittingly or mistakenly carry out such a practice — this is not in the least justifiable, but perhaps at times excusable.

To have the Federal agency openly declare that such a practice is its determined policy — that is certainly neither excusable nor legally permissible.

But to have such an issue solemnly presented to a United States Court, and then to have the Court disregard the issue completely and at the same time render a decision giving judicial sanction to that practice or policy, directly contrary to the provisions of a United States statute. The consequences of such a ruling on all government machinery and on all government spending are truly unthinkable!

REASONS FOR GRANTING THE WRIT

As is shown above, errors are found in the Circuit Court's Opinion on these points: In stating the facts of the case, the Court has omitted the very statements made by the Endowment which form the sine qua non basis of petitioner's complaint. On the question of the reviewers' refutations of petitioner's criticisms, the Court has enlarged the scope of petitioner's request for disclosure of information, changed the nature of the same request, and made deductions in arriving at its opinion on that erroneous basis. On the question of the reviewers' allegation against petitioner, the Court has attributed to petitioner arguments that he never used and omitted the arguments that he presented. And on the question of policy, the Court has totally ignored the important Federal issue raised by petitioner and stated a contrary opinion that is logically untenable.

Moreover, the judgment is in conflict with previous decisions rendered by other Courts of the United States on comparable matters.

Again, the judgment is in conflict with the Statute of the United States 20 U.S.C. 951 (5).

Furthermore, the judgment inflicts substantial injuries on petitioner's legal rights.

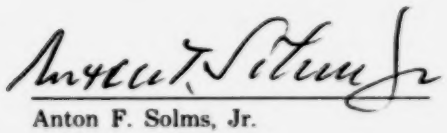
And, finally, the judgment involves three substantial and important Federal issues: (1) It sanctions the Endowment's withholding from the public what is only pure and factual academic information or knowledge. (2) It acquiesces in the Endowment's making an injurious allegation against petitioner and then denying him an opportunity to defend himself. And (3) it supports the Endowment's adopting and practicing a policy directly contrary to the statute-defined purpose for which it is established by Congress. In effect, it is according the Endowment a privilege or an authority far greater than what we think is permissible under our system of law and of government. If the judgment is allowed to stand, we gravely fear that it will open up a pandora's box of administrative abuses on the part of govern-

ment agencies. Review of the judgment is especially necessary because none of these issues, so far as we can ascertain, have been examined before by the Supreme Court of the United States.

CONCLUSION

The petition for Certiorari should be granted.

Respectfully submitted,



Anton F. Solms, Jr.
Counsel for Petitioner

P. O. Box 10085

Savannah, Georgia 31402

APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-2852

K.C.WU,

Plaintiff-Appellant,

versus

NATIONAL ENDOWMENT FOR HUMANITIES and WALLACE B. EDGERTON, as ACTING CHAIRMAN FOR THE NATIONAL ENDOWMENT FOR THE HUMANITIES,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Georgia

May 2, 1972

Before TUTTLE, GEWIN and THORNBERRY, Circuit Judges.

THORNBERRY, Circuit Judge: Appellant was born in 1903 in China, where he received a "classical" Chinese education. He has lived in the United States for a number of years and is presently a college professor in Georgia. About 1966 appellant became con-

vinced that most Chinese histories available in the United States were replete with factual errors. He attributes this deficiency to the inadequate training of Western sinologues, few, if any, of whom have had the benefit of a "classical" education.

In hope of correcting the errors he perceived, appellant wrote an article, "Local Government in Imperial China," which he submitted to the Journal of Asian Studies, the official publication of the Association for Asian Studies. The article was not accepted for publication. Appellant reacted by writing numerous letters over a period of a year and a half to the editors of the Journal, challenging their rejection and asking for detailed reasons for their decision. Dissatisfied with their response, appellant compiled a booklet that consisted of a brief introduction and conclusion and the forty-two letters comprising his correspondence with the Journal. He sent the booklet to "nearly every known China specialist in this country inviting them to refute [his] criticisms."[1] In addition, he wrote to the presidents of Harvard, Yale, Cornell, Michigan, California, and other colleges and universities, requesting them to urge their China scholars to refute his allegations of error. None of the China scholars replied.

Having failed to generate debate or even discernible interest in his theories, appellant concluded he should write a comprehensive history of China in which he would correct the errors he was concerned about. To

---

[1]Appellant's brief provides us with a summary of two of his criticisms of Western Chinese scholarship:

> (2) The Chinese never called their country "Flower Kingdom." The mistake was first made by Father Matthew Ricci around 1600 A.D.; but over these centuries not a single sinologue has realized that it was a mistake and sought to correct it. And (3) even in the matter of Confucianism, the one most important aspect of the Chinese culture, no Western scholar seems to have shown complete understanding. This is evidenced by the fact that though the translations of the Confucian classics were done by James Legge a century ago and are full of mistakes and obscurities, these are still being cited as standard works and used as a basis for the study of Confucianism.

assist him in this project, he applied to the National Endowment for the Humanities, a federal agency, for a $70,000 grant. Under Endowment procedures, this application was referred initially to five experts on Chinese history, each of whom is a professor of history at an American university. Four of these professors submitted written reviews and the fifth provided an oral review and requested that his comments be kept confidential. Each of the reviewers recommended rejection of the application. Secondly, the application, along with others, was referred to a panel of outside experts who consult the Endowment on the humanities generally but not necessarily on Chinese history in particular. This panel recommended rejection of the application. Next it was referred to a committee of fulltime staff members of the Endowment, who reviewed it along with all other applications in the research program. This committee also recommended rejection. Through this third level of consideration, each reviewer who assigned a numerical rating to the application assigned it a rating of "two." This rating signifies that the application is of poor quality and should not be funded even if enough money is available to support every application to the Endowment. Finally, the application was referred to the National Council on the Humanities which rejected it. The Chairman of the Endowment formally advised plaintiff of the rejection.

Appellant brought this action under the Freedom of Information Act, 5 U.S.C.A. § 552(a) (3) which provides in part:

(a) Each agency shall make available to the public information as follows:
(3) [E]ach agency, on request for identifiable records . . . shall make the records promptly available to any person. On complaint, the district court of the United States . . . has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly held from the

Appellant sought the following information:

> Records, or portions of records, which contain the refutations of each and all of the Defendants' five China specialists and which have been made by said specialists against complainant's criticisms of Western scholarship in the field of Chinese studies which were included in and were a part of Complainant's application to the Endowment and which application was known under Reference No. Application H-4344 and was dated January 22, 1970.
>
> Records or portions of records, which contain all of the facts or evidence which each and all of the Defendants' five China specialists gave to the said Defendant, National Endowment for the Humanities, in support of their statement that Complainant's training is not equal to the task which he has set himself to, that is, to write a new comprehensive "History of China," which would correct many mistakes heretofore made by Western scholars.

The Endowment resisted vigorously, fearing that if its outside consultants were subjected to one of appellant's massive letter-writing campaigns the Endowment would lose their services. Mr. Emerson, an Endowment official, said in his affidavit:

> These outside reviewers are not paid but firnish evaluation as a public service for the good of the humanities. Sometimes, they specifically ask that their recommendations be kept confidential. Even when such a specific request is not made, however, it is vital for the Endowment that their recommendations not be available to applicants; only then can reviewers be free to state their true opinion of an application without regard to the feelings of the applicant.

The Endowment based its defense on exemption (5) of the Freedom of Information Act:

> § 552
> (b) This section does not apply to matters that are —
> (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.

The district court granted summary judgment for the Endowment, concluding that the records sought came within the purview of exemption (5).

We agree with the district court that the work product of the Endowment's China specialists are intra-agency memoranda even though the five professors were not actually agency employees. In *Soucie v. David*, D. C. Cir. 1971, 448F.2d 1067, 1078n.44 the court said:

> The rationale of the exemption for internal communications [exemption (5)] indicates that the exemption should be available in connection with the Garwin Report even if it was prepared for an agency by outside experts. The Government may have a special need for the opinions and recommendations of temporary consultants, and those individuals should be able to give their judgments freely without fear of publicity. A document like the Garwin Report should therefore be treated as an intra-agency memorandum of the agency which solicited it.

Extending exemption (5) to outside consultants is especially appropriate in the instant case since Congress specifically empowered the Endowment to "utilize from time to time, as appropriate, experts and consultants." 20 U.S.C. § 959(2) (4).

The remaining question before us is whether the intra-agency memoranda at issue here would "be available by law to a party other than an agency in litigation with the agency." 5 U.S.C.A. § 552(b) (5), *supra*, that is, would the memoranda be subject to discovery by a party in litigation with the Endowment? It has

been consistently held that "purely factual" material, which is generally discoverable under Fed. R. Civ. P. 26(b), is not protected from disclosure by exemption (5). In contrast, advice, recommendations, opinions, and other subjective material are protected.

> [Exemption (5)] was intended to encourage the free exchange of ideas during the process of deliberation and policy-making; accordingly, it has been held to protect internal communications consisting of advice, recommendations, opinions, and other material reflecting deliberative or policy-making processes, but not purely factual or investigatory reports. *Soucie v. David, supra,* at 1077.

> The statute exempts inter-agency or intra-agency memorandums or letters which would not be available to a party other than an agency in litigation with the agency . . . This provision encourages the free exchange of ideas among government policy makers, but it does not authorize an agency to throw a protective blanket over all information by casting it in the form of an internal memorandum. Purely factual reports and scientific studies cannot be cloaked in secrecy by an exemption designed to protect only "those internal working papers in which opinions are expressed or policies formulated and recommended." *Bristol-Myers Co. v. FTC,* D.C. Cir. 1970, 424 F.2d 935, 939.

Accord, General Services Admin. v. Benson, 9th Cir. 1969, 415 F.2d 878, 880. Appellant argues that these cases support his position, since all he seeks is academic knowledge that is in the truest sense "purely factual." We disagree. The records he wants on the inadequacy of his academic background are opinions, not facts, and are thus protected by exemption (5). The agency's consultants simply concluded from the facts appellant submitted that in their opinion his training was inadequate. The agency is withholding only the opinions of its experts, not any facts.

We turn now to the second category of information sought by appellant, the consultants' memoranda on the merits of his proposed project. Again we apply the "purely factual" test to determine if these memoranda are exempt from disclosure. The test is, of course, not an ironclad one, since virtually any memorandum prepared for an agency will contain some factual material along with the opinions and recommendations. A careful case-by-case analysis of the material sought is thus necessary. We believe, however, the "purely factual" rule can be better understood when viewed in the context of the cases in which it has been employed. The material at issue in these cases has always been predominantly, if not purely, factual information that is not generally available to the public. *Mink v. Environmental Protection Agency*, D.C. Cir. 1971, 40 USLW 2233 (report on the environmental aspects of the Amchitka Island nuclear test); *Soucie v. David, supra*, (report evaluating the Government's program for development of the Supersonic Transport); *General Services Admin. v. Benson, supra*, (records of property sale); *Consumers Union of United States v. Veterans' Admin.*, 301 F. Supp. 796 (S.D.N.Y. 1969) (records of hearing aid tests).

In contrast, in the instant case the memoranda sought are not factual or scientific reports but recommendations containing the opinions of five China specialists on the merits of appellant's application for a federal grant. Such recommendations will usually contain some factual material but it is only incidental to their primary purpose, which is the expression of an opinion to assist the agency in reaching a decision on the grant. There was no requirement here for the consultants to "refute" appellant's theories. We do not think the fact that one or more of the five either included some factual material in his memorandum or stated to the Endowment that he was able to refute appellant's arguments transforms these opinions into factual matter within the meaning of the "purely factual" rule.

Appellant bases his case more on policy than on statutes or case law. He firmly believes that the failure of the academic community to respond to his theories on China is reprehensible at best. The courts are apparently his last resort in his effort to

generate debate. The Endowment responds with its own policy argument. It says requiring disclosure of these memoranda would seriously weaken its programs, which rely heavily on unpaid outside experts. Just as professors would be hesitant to render opinions on their students who apply for Government-supported scholarships if they knew their recommendations were to be made public to "any person," they would be equally hesitant to assit the Endowment on grant applications if their comments were available to the public.

In *Ackerly v. Ley*, D.C. Cir. 1969, 420 F.2d 1336, 1341, the court said:

> *** we accept the Commissioner's contention that the Congress intended that Exemption (5) was to reflect the privilege, customarily enjoyed by the Government in its litigations, against having to reveal those internal working papers in which opinions are expressed and policies formulated and recommended.
>
> The basis of Exemption (5), as of the privilege which antedated it, is the free and uninhibited exchange and communication of opinions, ideas, and points of view — a process as essential to the wise functioning of a big government as it is to any organized human effort. In the Federal Establishment, as in General Motors or any other hierarchical giant, there are enough incentives as it is for playing it safe and listing with the wind; Congress clearly did not propose to add to them the threat of cross-examination in a public tribunal.

In *International Paper Co. v. FPC*, 2d Cir. 1971, 438 F.2d 1349, 1358-59, another court of appeals wrote:

> To allow disclosure of these documents would interfere with two important policy considerations on which § 552(b) (5) is based: encouraging full and candid intra-agency discussion, and shielding from disclosure the mental processes of executive and administrative officers . . . (citations omitted).

> There is embodied in § 552(b) (5) the privilege, customarily enjoyed by the Government in its litigations, against having to reveal those internal working papers in which opinions are expressed and policies formulated and recommended. (citations omitted) The appellant's requested discovery must be denied under the fifth exception, because it seeks the disclosure of items used in the FPC's deliberative processes.

We believe the memoranda at issue in the instant case are "internal working papers in which opinions are expressed" and are involved in the Endowment's "deliberative processes." They are, therefore, protected from disclosure by exemption (5). Moreover, we agree with the Endowment that disclosure of the records sought could severely hamper its work. The community of Chinese scholars and of others in specialized fields is small, and the members are the only ones qualified to evaluate each other's work. Surely they would be hesitant to be frank with the Endowment in their evaluations of a colleague's work if they knew he could readily obtain their comments from the Endowment. The Endowment's interest in retaining the services of these outside experts clearly outweighs the public's interest in whatever factual excerpts there may be in the memoranda appellant seeks.

AFFIRMED

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA SAVANNAH DIVISION

K. C. WU,
Plaintiff

vs.

NATIONAL ENDOWMENT FOR HUMANITIES and WALLACE B. EDGERTON, as Acting Chairman for the National Endowment for the Humanities,
Defendants

CIVIL ACTION NO. 2754

U. S. DISTRICT COURT Southern District of Ga.
Filed in office June 30, 1971
EDWARD M. ILDERTON
Chief Deputy Clerk

This is an action pursuant to 5 U.S.C. § 552, the Freedom of Information Act, to have defendants disclose the recommendations of certain advisors to the defendant agency which resulted in plaintiff being refused a grant to write a "new comprehensive history of China." Defendants filed a motion to dismiss and, in the alternative, a motion for summary judgment. Plaintiff responded with his own motion for summary judgment.

K. C. Wu is a history professor at Armstrong State College in Savannah, Georgia. He was a citizen of China for many years before arriving in the United States. It is Mr. Wu's opinion that existing Western treatment of China history is erroneous. Therefore, he desires financial assistance from the United States Government to write a new History of China.

The National Endowment for the Humanities, a United States agency, was established under 20 U.S.C. § 956 to encourage scholarship in the humanities by awarding grants to individuals for research and publication. The term "humanities" includes history. 20 U.S.C. §952(a). Mr. Wu's application was examined by five professors who are regarded as experts on Chinese history. The grant was refused by the agency partially on the basis of the unanimous recommendation of these scholars. The affidavits attached to the motion show that the refusal was based on the fact that Mr. Wu's criticism of interpretation of Chinese history had been refuted and that his training for the task was inadequate. Plaintiff contends that his criticisms have not been refuted and that the agency's decision was grounded solely and erroneously on alleged inadequate training.

Plaintiff's insistence on disclosure is based upon 5 U.S.C. § 552(a) (3) which provides that ". . . each agency, on request for identifiable records . . . shall make the records promptly available to any person. On complaint, the district court of the United States . . . has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly held from the complainant." Defendants rely on 5 U.S.C. § 552 (b) which provides certain exceptions to the above requirements. "This section does not apply to matters that are . . . (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

A district court has certain equitable powers which may be used to require a government agency to give reasons for its decision. *American Mail Line, Ltd. v. Gulick*, 411 F.2d 696. Congress has enacted the Freedom of Information Act so that disclosure of governmental information would be the rule rather than the exception. *Wellford v. Hardin*, 315 F. Supp. 768. Exemptions under subsection (b) of 5 U.S.C. § 552 are to be narrowly construed. *Bristol-Myers Co. v. F.T.C.*, 424 F.2d 935. The purpose of the Act is to make available to the public any agency records which would routinely be disclosed through the discovery process in litigation against the agency. *Grumman Aircraft Engineering Corp. v. Renegotiation Board*, 425 F.2d 578. Indeed, the criteria

for permitting disclosure is ordinarily based upon the federal discovery rules. *Grumman Aircraft, supra; General Services Administration v. Benson*, 415 F.2d 878. Where an agency ruling is based solely on an identifiable memorandum, it must be made available to any member of the public. *American Mail Line, supra.* See generally, 7 ALR Fed 855.

The congressional intent as to the statutory exception (5 U.S.C. § 552(b) (5) to agency disclosure is reflected in 5 Rep. No. 1219, 88th Cong., 2d Sess., 13-14:

> "Exception No. 5 would exempt 'inter-agency or intra-agency memoranda or letters dealing solely with matters of law or policy.' This exemption was made upon the strong urging of virtually every Government agency. It is their contention, and one that the committee believes has merit, that there are certain governmental processes relating to legal and policy matters which cannot be carried out efficiently if they must be carried out 'in a goldfish bowl.' Government officials would be most hesitant to give their frank and conscientious opinion on legal and policy matters to their superiors and co-workers if they knew that, at any future date, their opinions of the moment would be spread on the public record. The Committee is of the opinion that the Government can not operate effectively or honestly under such circumstances. Exception No. 5 has been included to cover this situation, and it will be noted that there is no exemption for matters of a factual nature."

Several courts have described the exception as the privilege of the Government not to be required to "reveal those internal working papers in which opinions are expressed and policies formulated and recommended." *Ackerly v. Ley*, 420 F.2d 1336, 1341; *Freeman v. Seligson*, 405 F.2d 1326. In *Bristol-Meyers* at 939 the exemption was held inapplicable to "purely factual reports and scientific studies."

The affidavit of William Edgerton, Acting Chairman of the National Endowment for the Humanities, shows that Mr. Wu's

application was rejected on four levels of review. It was first referred to the Research and Publication Division where it was rejected by five experts on Chinese History. Four professors submitted written reports while one made an oral report. Secondly, a panel of outside experts found the application wanting. Its members are not necessarily skilled in Chinese history but are experts in the general area of "humanities." Mr. Wu's application was also submitted to the staff members of the National Endowment for the Humanities who turned it down. Finally, it was brought before the National Council for the Humanities on May 22, 1970, and rejected on May 27th.

Applying the law to the facts presented, I find that the memorandum which plaintiff seeks is within the purview of 5 U.S.C. § 552 (b) (5). The memoranda were intra-agency opinions, non-factual in nature. They concerned the policy of awarding grants in history only to meritorious applicants. Furthermore, the National Council for the Humanities based their decision to reject Mr. Wu's application on information independent of such memoranda.

I see no compelling need to make public the opinions of five Chinese History experts concerning the quality of the work product of a hopeful applicant for financial support for a work on history. This agency was not created to restrict and regulate a plaintiff's work but rather is a gratuity, a privilege, a matter of grace, available to those persons who meet standards of excellence in the humanities. The short answer to the whole business is that even if Mr. Wu were given the relief sought he would not possess any legal right or standing as a suitor to demand, require and acquire a grant.

The rejection of Mr. Wu's application does not mean that he cannot write a "New History of China", only that he cannot receive free financial aid from the United States to write it.

Defendants' motion for summary judgment is granted.

This 30 day of June, 1971.

ALEXANDER A. LAWRENCE
Chief Judge, United States District Court
Southern District of Georgia

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA SAVANNAH DIVISION

K. C. WU,
Plaintiff

vs.

National Endowment For The Humanities, Et Al.,
Defendants

U. S. District Court Southern District of Ga.
Filed in office July 22, 1971
ELOISE C. GERKEN
Deputy Clerk

CIVIL ACTION NO. 2754

ORDER

The Order of July 15, 1971, in this action denying plaintiff's motion for new trial is amended by adding the following paragraph:

Recently, in *Evans v. Department of Transportation of the United States*, No. 31092 (July 13, 1971), the Fifth Circuit of Appeals affirmed the granting of a summary judgment against plaintiff who sought the disclosure of letters written to the Federal Aviation Agency concerning plaintiff's capabilities as a commercial airline pilot. Holding that the investigatory letters were exempt from disclosure under 5 U.S.C. § 552(b) (7), the Court stated:

"We are of the further opinion that Congress could not possibly have intended that such letters should be disclosed once an investigation is completed. If this were so and disclosure were made, it would soon become a matter of common knowledge with the result that few individuals, if any, would come forth to embroil themselves in controversy or possible recrimination by notifying the Federal Aviation Agency of something which might justify investigation."

This 22 day of July, 1971.

ALEXANDER A. LAWRENCE
Chief Judge, United States District Court
Southern District of Georgia

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA SAVANNAH DIVISION

K. C. Wu,
Plaintiff
vs.
National Endowment for the Humanities, Et Al.,
Defendants

U. S. District Court Southern District of Ga.
Filed in office Aug. 17, 1971
ELOISE C. GERKEN
Deputy Clerk

CIVIL ACTION NO. 2754

ORDER

Upon due consideration of any and all motions filed subsequent to this Court's summary judgment in favor of defendants in the above styled action, it is hereby ordered that all said motions are overruled.

This 17 day of August, 1971.

ALEXANDER A. LAWRENCE
Chief Judge, United States District Court
Southern District of Georgia

APPENDIX E

5 § 552

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person. On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action. In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member. Except as to causes the court considers of greater importance, proceedings before the district court, as authorized by this paragraph, take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way.

(b) This section does not apply to matters that are—

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

20 § 951

CONGRESSIONAL DECLARATION OF PURPOSE

The Congress hereby finds and declares—

(1) that the encouragement and support of national progress and scholarship in the humanities and the arts, while primarily a matter for private and local initiative, is also an appropriate matter of concern to the Federal Government;

(5) that the practice of art and the study of the humanities requires constant dedication and devotion and that, while no government can call a great artist or scholar into existence, it is necessary and appropriate for the Federal Government to help create and sustain not only a climate encouraging freedom of thought, imagination, and inquiry but also the material conditions facilitating the release of this creative talent;

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of July, 1972, I have served the foregoing Writ of Certiorari upon the Honorable Erwin N. Griswold, the Solicitor General of the United States, Room 5143, Department of Justice, Washington, D. C. 20530, and upon Walter H. Fleischer and Raymond D. Battocchi, Attorneys for Respondents, Department of Justice, Washington, D. C. 20530, by depositing copies thereof in the United States Post Office in Savannah, Georgia with Airmail postage prepaid.

This 21st day of July, 1972.

Anton F. Solms, Jr.
Attorney for Petitioner

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-137

K. C. WU, PETITIONER

v.

NATIONAL ENDOWMENT FOR THE HUMANITIES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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1. Petitioner applied to the National Endowment for the Humanities (the "Endowment") for a grant to write a comprehensive history of China. Under Endowment procedures, the application was referred to five American professors of Chinese history for evaluation.[1] Four professors submitted written re-

[1] These professors work as unpaid consultants to the Endowment "as a public service for the good of the humanities" (Pet. App. A 31). The Endowment has a strong interest in retaining such services (Pet. App. A. 36).

views, and the fifth submitted an oral review, all recommending against the application. After receiving these and other evaluations, the Endowment rejected petitioner's grant application (Pet. App. A 29-30).

Petitioner then instituted this action under the Freedom of Information Act, 5 U.S.C. 552, in the United States District Court for the Southern District of Georgia, seeking from the Endowment records, or portions of records, which contain (1) refutations by the five experts of petitioner's criticism of Western scholarship in the field of Chinese studies, and (2) all facts or evidence given by these experts to the Endowment in support of their opinion that petitioner's training is inadequate for the task outlined in his application (Pet. App. A 31). The district court granted the Endowment's motion for summary judgment, concluding that the documents are covered by Exemption 5 of the Freedom of Information Act, 5 U.S.C. 552(b)(5), which exempts from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party * * * in litigation with the agency" (Pet. App. B 37, 40). The court of appeals affirmed (Pet. App. A).

2. The decision below is correct and presents no questions warranting further review.

The court of appeals correctly concluded (Pet. App. A 32) that the documents constitute intra-agency memoranda within the meaning of Exemption 5. The government often needs the opinions of temporary

consultants, who should be able to give their opinions freely and without fear of publicity in the same manner as agency employees, see *Soucie* v. *David*, 448 F. 2d. 1067, 1078, n. 44 (C.A. D.C.), and Congress has specifically empowered the Endowment to utilize the services of such consultants, 20 U.S.C. 959(a)(4).

Exemption 5 protects the government "against having to reveal those internal working papers in which opinions are expressed and policies formulated and recommended," *Ackerly* v. *Ley*, 420 F. 2d 1336, 1341 (C.A. D.C.). It reflects the policies of "encouraging full and candid intra-agency discussion, and shielding from disclosure the mental processes of executive and administrative officers," *International Paper Co.* v. *Federal Power Commission*, 438 F. 2d 1349, 1358-1359 (C.A. 2). The rationale of Exemption 5 is fully applicable here. As the court below noted (Pet. App. A 36), the candid views of scholars concerning grant applications could not be obtained if their comments were subject to disclosure to the applicant.

Intra-agency documents are protected by Exemption 5 unless they are of a kind which would "routinely be disclosed to a private party through the discovery process," H. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966); *Sterling Drug Inc.* v. *Federal Trade Commission*, 450 F. 2d. 698, 705 (C.A. D.C.). As the court of appeals stated, the documents sought here—letters or other memoranda commenting on the merits of petitioner's grant application—"are not factual

* * * reports but recommendations containing * * * opinions * * *" (Pet. App. A 34). As such, these documents constitute internal working papers which would not routinely be disclosed in litigation and they therefore are within Exemption 5. Since the documents are only expressions of opinion concerning the value of a proposed academic project and do not constitute or include factual reports, this case does not present the issue before this Court in *Environmental Protection Agency* v. *Mink*, No. 71-909.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1972.

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